

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

LINDSAY TRANSMISSION, LLC, individually  
and on behalf of all others similarly-situated,

Plaintiff,

v.

OFFICE DEPOT, INC.,

Defendant.

Case No. 4:12-cv-00221-CEJ

**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiff, LINDSAY TRANSMISSION, LLC (“Plaintiff”), brings this action on behalf of itself and all others similarly situated, through its attorneys, and except as to those allegations pertaining to Plaintiff or its attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendant, OFFICE DEPOT, INC., (“Defendant”):

**PRELIMINARY STATEMENT**

1. This case challenges Defendant’s practice of sending unsolicited facsimiles.
2. The federal Telephone Consumer Protection Act, 47 USC § 227 (“TCPA”), prohibits a person or entity from sending or having an agent send fax advertisements without the recipient’s prior express invitation or permission (“junk faxes” or “unsolicited faxes”). The TCPA provides a private right of action and provides statutory damages of \$500 per violation.
3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient’s valuable time that would have been spent on something else. A junk fax interrupts the recipient’s privacy.

Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients' fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendant under the TCPA.

5. Plaintiff seeks an award of statutory damages for each violation of the TCPA and a declaration that defendant's conduct violated the TCPA.

### **JURISDICTION AND PARTIES**

6. This court has personal jurisdiction over Defendant because Defendant transacts business within this state, have made contracts within this state, and/or have committed tortious acts within this state and otherwise have sufficient minimum contacts with the State of Missouri.

7. Plaintiff LINDSAY TRANSMISSION, LLC, is a Missouri limited liability company with its principal place of business in Missouri.

8. Defendant, OFFICE DEPOT, INC., is a corporation with its principal place of business in Florida doing business in the state of Missouri.

### **FACTS RELEVANT TO ALL COUNTS**

9. On or about March 6, 2011 Defendant from its location in Warrensburg, Missouri sent an unsolicited facsimile to Plaintiff in Johnson County, Missouri. A true and correct copy of the facsimile is attached as Exhibit 1.

10. On or about April 1, 2011 Defendant from its location in Warrensburg, Missouri sent an unsolicited facsimile to Plaintiff in Johnson County, Missouri. A true and correct copy of the facsimile is attached as Exhibit 2.

11. On or about June 30, 2011 Defendant from its location in Warrensburg, Missouri sent an unsolicited facsimile to Plaintiff in Johnson County, Missouri. A true and correct copy of the facsimile is attached as Exhibit 3.

12. Defendant approved, authorized and participated in the scheme to broadcast faxes by using the Warrensburg Chamber of Commerce list (a) directing and supervising employees to send the faxes; (b) creating and approving the form of fax to be sent; and (c) determining the number and frequency of the facsimile transmissions.

13. Defendant created or made Exhibits 1 – 3, which Defendant distributed to Plaintiff and the other members of the class.

14. Exhibits 1 – 3 are a part of Defendant's work or operations to market Defendant's goods or services which was performed by Defendant and/or on behalf of Defendant.

15. Exhibits 1 – 3 constitute material furnished in connection with defendant's work or operations.

16. Exhibits 1 – 3 hereto is material advertising the commercial availability of any property, goods, or services.

17. The transmissions of Exhibits 1 – 3 to Plaintiff did not contain a notice that informs the recipient of the ability and means to avoid future unsolicited facsimiles.

18. The transmissions of Exhibits 1 – 3 to Plaintiff did not contain a notice that states that the recipient may make a request to the sender of the facsimiles not to send any future facsimiles to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful.

19. The transmissions of Exhibits 1 – 3 to Plaintiff did not contain at the top or bottom of the first page, the correct date and time it was sent and an identification of the entity sending the message and the telephone number of the sending machine or of such entity.

20. The transmissions of Exhibits 1 – 3 to Plaintiff did not contain a notice that complied with the provisions of 47 U.S.C. § 227(b)(1)(C) and/or 47 C.F.R. 64.1200(a)(3).

21. The transmissions of Exhibits 1 – 3 to Plaintiff was required to contain a notice that complied with the provisions of 47 U.S.C. § 227(b)(1)(C) and/or 47 C.F.R. 64.1200(a)(3).

22. Plaintiff had not invited or given permission to Defendant to send facsimiles.

23. Defendant sent multiple unsolicited facsimiles to Plaintiff and members of the proposed classes throughout the time period covered by the class definition.

24. Defendant faxed the same and similar facsimiles to the members of the proposed classes in Missouri without first obtaining the recipients' prior express permission or invitation.

25. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving unlawful faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

26. Defendant knew or should have known that: (a) Exhibits 1 – 3 were advertisements; (b) Defendant did not obtain prior permission or invitation to send Exhibits 1 – 3; and (c) Defendant did not display a proper opt out notice on Exhibits 1 – 3.

27. Defendant failed to correctly determine the legal restrictions on the use of facsimile transmissions and the application of those restrictions to the transmission of Exhibits 1 – 3 both to others in general, and specifically to Plaintiff.

**TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227**

28. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

29. Plaintiff brings this action pursuant to the Telephone Consumer Protection Act, 47

U.S.C. § 227, on behalf of the following class of persons:

All persons who (1) on or after February 1, 2011 through August 31, 2011, (2) were sent telephone facsimile messages, from the Office Depot Store #2142, located in Warrensburg, Missouri, the same or similar to Exhibits 1, 2 and 3 by or on behalf of Defendant Office Depot.

30. A class action is warranted because:

a. Through discovery, the class includes more than forty persons and is so numerous that joinder of all members is impracticable.

b. There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation:

i. Whether Defendant engaged in a pattern of sending unsolicited fax advertisements;

ii. Whether Exhibits 1 – 3 contains material advertising the commercial availability of any property, goods or services;

iii. The manner and method Defendant used to compile or obtain the list of fax numbers to which they sent Exhibits 1 – 3 and other unsolicited faxed advertisements;

iv. Whether Defendant faxed advertisements without first obtaining the recipients' prior express permission or invitation;

v. Whether Defendant violated the provisions of 47 USC § 227;

- vi. Whether Plaintiff and the other class members are entitled to statutory damages;
- vii. Whether Exhibits 1 – 3 displayed each required element of the opt out notice required by 64 C.F.R. 1200;
- viii. Whether Exhibits 1 – 3 displayed each required element of the date, time, and identification required by 47 USC § 227;
- ix. Whether Defendant’s acts were “knowing” as that term is used in 47 USC § 227;
- x. Whether Defendant should be enjoined from faxing advertisements in the future; and
- xi. Whether the Court should award trebled damages.

31. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff’s counsel are experienced in handling class actions and claims involving unsolicited advertising faxes. Neither Plaintiff nor Plaintiff’s counsel has any interests adverse or in conflict with the absent class members.

32. A class action is the superior method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

33. The TCPA prohibits the “use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine....” 47 U.S.C. § 227(b)(1).

34. The TCPA defines “unsolicited advertisement,” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s express invitation or permission.” 47 U.S.C. § 227(a)(4).

35. The TCPA provides:

Private right of action. A person may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that state:

(A) An action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) An action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater,

or

(C) Both such actions.

36. The Court, in its discretion, may treble the statutory damages if the violation was knowing. 47 U.S.C. § 227.

37. The TCPA is a strict liability statute and the Defendant is liable to Plaintiff and the other class members even if its actions were only negligent.

38. If the court finds that Defendant knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount available under subparagraph (B) of this paragraph. 47 U.S.C. § 227(b)(3).

39. Defendant knew or should have known that: (A) Plaintiff and the other class members had not given express permission or invitation for Defendant or anyone else to fax advertisements about Defendant’s goods or services, (B) Exhibits 1 – 3 were advertisements, and (C) Exhibits 1 – 3 did not display the proper opt out notice.

40. Defendant violated 47 U.S.C. § 227 et seq. by transmitting Exhibits 1 – 3 hereto to Plaintiff and the other members of the class without obtaining their prior express permission or invitation and not displaying the proper opt out notice required by 64 C.F.R. 1200.

WHEREFORE, Plaintiff, LINDSAY TRANSMISSION, LLC, individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendant, OFFICE DEPOT, INC., as follows:

- A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff's counsel as counsel for the class;
- B. That the Court award \$500.00 to \$1,500 in damages for each and every violation of the TCPA;
- C. That the Court enter an injunction prohibiting the Defendant from engaging in the statutory violations at issue in this action;
- D. That the Court declare that Defendant's conduct violated the TCPA and that this action is just and proper;
- E. That the Court award costs and such further relief as the Court may deem just and proper;
- F. That the Court award pre-judgment and post-judgment interest at the statutory rate of 9%; and
- G. That the Court award plaintiff its attorney fees and all expenses incurred in preparing and prosecuting this claim on behalf of the class.



**PRAYER**

WHEREFORE, Plaintiff, LINDSAY TRANSMISSION, LLC, individually and on behalf of all others similarly situated, demand judgment in its favor and against Defendant, OFFICE DEPOT, INC., as follows:

- A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the class representative, and appoint Plaintiff's counsel as counsel for the class;
- B. That the Court award statutory damages to Plaintiff and the other class members;
- C. That the Court award treble damages to Plaintiff and the other class members for knowing violations of the TCPA;
- D. That the Court declare that Defendant's conduct violated the TCPA and that this action is just and proper;
- E. That the Court award attorney fees and costs;
- F. That the Court award all expenses incurred in preparing and prosecuting these claims;
- G. That the Court enter an injunction prohibiting Defendant from sending faxed advertisements; and
- H. Awarding such further relief as the Court may deem just and proper.

/s/Max G. Margulis  
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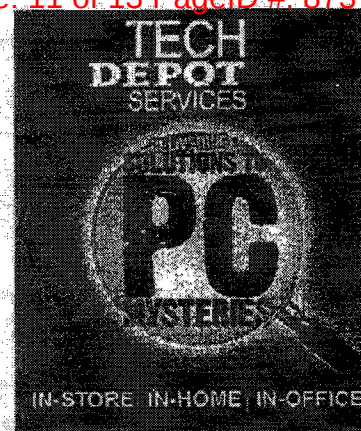
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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of January, 2013, I submitted the foregoing via this Court's CM/ECF electronic filing service, pursuant to Rule 28A(a), which served notice of the filing on the Attorneys for Defendant, David P. Stoeberl and Tina N. Babel, Carmody MacDonald, P.C., 120 S. Central Ave, Ste 1800, St. Louis, MO 63105, P: 314-854-8600, F: 314-854-8660. Email: [dps@carmodymacdonald.com](mailto:dps@carmodymacdonald.com) and [tnb@carmodymacdonald.com](mailto:tnb@carmodymacdonald.com) and Michael A. Swartzendruber and Casey Moore, Fulbright & Jaworski, LLP, 2200 Ross Ave, Ste 2800, Dallas, TX 75201-2784, P: 214-855-8000, F: 214-855-8200, Email: [mswartzendruber@fulbright.com](mailto:mswartzendruber@fulbright.com) and [cmoore@fulbright.com](mailto:cmoore@fulbright.com), and a courtesy copy was also served by email.

/s/Max G. Margulis

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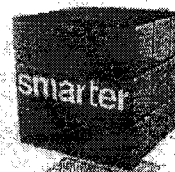
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**EXHIBIT 1**



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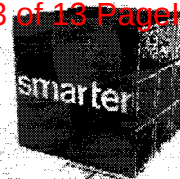
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# EXHIBIT 3